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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No.

ALDO GUERRINI,

Petitioner,

vs.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Aldo Guerrini, by his attorney, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit entered in the above cause March 31, 1948 (R. 151).

Opinions Below

The opinion of the United States District Court for the Eastern District of New York (Abruzzo, D. J.) has not been officially reported, but appears in the record at p. 129. The

district court entered findings of fact (R. 132) and conclusions of law (R. 133). The opinion of the Circuit Court of Appeals for the Second Circuit appears in the record at p. 145 (L. Hand, Swan and Frank, JJ.), and is reported in 167 F. 2d 352.

Jurisdiction

The judgment of the circuit court of appeals was entered on March 31, 1948 (R. 151). The jurisdiction of this Court is invoked under § 240(a) of the Judicial Code, as amended (c. 229, 43 Stat. 936, 938, as amended; 28 U. S. C. § 347).

Questions Presented

1. Whether a shipowner in control of a vessel is obligated to provide a seaworthy vessel and a safe place to work for an employee of an independent contractor employed on board the vessel in cleaning her tanks and boilers.

2. Whether the right of an employee of an independent contractor to recover damages for injuries sustained while employed on board a vessel under the control of a shipowner to clean her tanks and boilers depends upon the local law or the law of the sea.

3. Whether a circuit court of appeals sitting in admiralty may determine the comparative negligence of both parties to the suit in the absence of determination of the degree of negligence of each party.

Statutes Involved

The Suits in Admiralty Act, c. 95, 41 Stat. 525, 46 U. S. C. c. 20, §§ 741 *et seq.*; provides in part:

> *Sec. 1.* No vessel owned by the United States or by any corporation in which the United States or its representatives shall own the entire outstanding capital stock or in the possession of the United States or of

such corporation or operated by or for the United States or such corporation . . . shall . . . be subject to arrest or seizure by judicial process in the United States or its possessions . . .

Sec. 2. In cases where if such vessel were privately owned or operated . . . a proceeding in admiralty could be maintained at the time of the commencement of the action herein provided for, a libel in personam may be brought against the United States . . . provided that such vessel is employed as a merchant vessel or is a tugboat operated by such corporation. Such suits shall be brought in the district court of the United States for the district in which the parties so suing, or any of them, reside or have their principal place of business in the United States, or in which the vessel or cargo charged with liability is found. . . .

Sec. 3. Such suits shall proceed and shall be heard and determined according to the principles of law and to the rules of practice obtaining in like cases between private parties. . . . Decrees shall be subject to appeal and revision as provided in other cases of admiralty and maritime jurisdiction. . . ."

Statement

This is a suit by petitioner against respondent under the *Suits in Admiralty Act, supra,* to recover for personal injuries sustained by petitioner in the course of his work.[1] At the time the injuries were sustained, petitioner was an employee of a contracting company engaged in the work of cleaning tanks on board the *William B. Giles,* a troop-carry-

[1] This action is not based upon the Jones Act, which is restricted to actions by employees (seamen) against employers, but is based upon the breach of the traditional obligation on the part of vessel owners to provide a seaworthy vessel and a safe place to work for those who perform on board the vessel the ship's service with the owner's consent or by his arrangement. It involves no question of the Longshoremen and Harbor Workers Compensation Act for the reasons set forth in the opinion of this Court in *Seas Shipping Co.* v. *Sieracki,* 328 U. S. 85, 100-101.

ing liberty ship owned by respondent and tied to a wharf in the East River in Brooklyn. (Fdgs. 1-2.)

Petitioner and a co-worker were lowering a bale of rags weighing about a hundred pounds into a hatch. The rags were used in cleaning the fresh-water tanks at the bottom of the hold. While petitioner was lowering the bale of rags just over the hatch coaming, he slipped on grease and oil on the deck, lost his balance, and the weight of the bale of rags caused him to be drawn over the hatch coaming, so that he fell into the hold. He received severe personal injuries. (Fdgs. 3-4, R. 132-3.) Respondent was in control of the ship; knew that employees of the contractor cleaning the tanks were working around the hatch and had to use the deck around the hatch during the course of their work; and negligently left grease on the deck around the hatch. (Fdgs. 5-6, R. 133.) Petitioner's injuries were received as a result of this negligence of respondent. (Fdg. 6; concl. 1, R. 133.) The district court found that there was no contributory negligence on the part of petitioner. (Concl. 2, R. 133.)

The Circuit Court of Appeals for the Second Circuit reversed. (R. 145.) It recited the trial court's findings of negligence of the vessel, and petitioner's freedom from contributory negligence or assumption of risk, and held that it could not "say that it was 'clearly erroneous' to find that the libellant [petitioner] fell into the hold because he slipped upon the grease". (R. 146). It held that it was necessary to determine whether there is applicable to this case the doctrine expressed by this Court in *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85, holding a shipowner liable to a stevedore for breach of an implied duty to make the ship seaworthy; and while it thought it impossible to be sure how far the "new doctrine" may go, it hesitated to apply that doctrine to this workman even though petitioner's work could be, like that of the stevedore in the *Sieracki* case,

"equally regarded as part of the 'ship's service' ". (R. 146-7.) It felt that petitioner's relationship to respondent was that of a "business guest", so that the shipowner's liability depended upon the law of New York rather than the admiralty law, and refused to follow the view of the highest court of the State of New York which has recently held the law of the sea, rather than local law, to be applicable. (R. 147-148.) Upon a review of the local law, it found that the duty of petitioner was the same as that of employer to employee. It held that the finding that respondent was negligent "is not a finding of fact" (R. 150); and it thought that there must be a specific finding as to how long the grease had been on the deck. If on the remand petitioner does satisfy the judge that the grease had been left in the place where he slipped so long that it should have been noticed by the officer on watch, then, considering that petitioner must have been either totally indifferent to any possibility of danger, or have paid no attention to his footing, he may recover in the proportion of one to four. (R. 150.)

Specification of Errors to be Urged

The court below erred:

1. In holding that local law (the law of New York) rather than the law of the sea applies to this proceeding.

2. In holding that the law of the sea does not require a shipowner in control of a vessel to provide a seaworthy vessel and a safe place to work for an employee of an independent contractor employed on board the vessel in cleaning her water tanks.

3. In holding that the doctrine of *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85, is inapplicable in this case.

4. In holding that the court might make its own finding of fact or mixed question of law and fact with respect to the

negligence or comparative negligence of the respective parties.

5. In deciding in favor of respondent and against petitioner.

Reasons for Granting the Writ

The decision of the court below that the petitioner must prove respondent's negligence by showing that the unsafe condition of the vessel had existed for sometime is, of course, based upon the court's assumptions (a) that the local law rather than the law of the sea applies to this proceeding, and (b) that the application of the doctrine of this Court in *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85, is limited to stevedores and does not extend to other employees of independent contractors employed on board a vessel which is under the control of the shipowner to perform part of the "ship's service"; for if the law of the sea and the doctrine of the *Sieracki* case apply, it is clear that respondent was obligated, without regard to its fault, to provide a seaworthy vessel and a safe place for petitioner to work. *Sea Shipping Co., supra*, 100-101; *Mahnich* v. *Southern S. S. Co.*, 321 U. S. 96. The court's decision that petitioner was guilty of contributory negligence because he "must have been either totally indifferent to any possibility of danger, or have paid no attention whatever to his footing" must likewise depend upon its assumptions that the law of the sea and the doctrine of the *Sieracki* case do not apply; for if the law of the sea and the doctrine of the *Sieracki* case apply, petitioner had every right to assume and to act upon the assumption that respondent had complied with its obligation to furnish a seaworthy vessel and a safe place to work (*Mahnich* v. *Southern S. S. Co., supra; Krey* v. *United States* (C. C. A. 2d, 1941), 123 F. 2d 1008) and he could not have been negligent because he did not look for danger when

he had no reason to apprehend any. *Sears, Roebuck & Co.* v. *Scroggins* (C. C. A. 8th, 1944), 140 F. 2d 718, 723.

1. The decision of the court below, sitting in New York, conflicts with the decision of the New York Court of Appeals in *Riley* v. *Agwilines*, 296 N. Y. 402, on a matter in which both courts have concurrent jurisdiction, with respect to the law by which the duties and rights of the parties are to be determined. This conflict is recognized by both courts. The conflict revolves about, and is recognized by both courts through reference to, an earlier decision of the court below in *Puleo* v. *H. E. Moss, Inc.* (C. C. A. 2d, 1947), 159 F. 2d 842. The New York Court of Appeals held in *Riley* v. *Agwilines, supra* (an action under the maritime jurisdiction for wrongful death of a stevedore who fell through an uncovered hatch):

> " 'Notwithstanding the State court has concurrent jurisdiction with the Federal courts to entertain the suit (*Messel* v. *Foundation Co., supra;* [*Spencer*] *Kellog & Sons, Inc.* v. *Hicks,* 285 U. S. 502, 514, 52 S. Ct. 450, 453, 76 L. Ed. 903) and the action is brought in the State court, the principles and rules of the substantive maritime law are alone to be applied as ground, if any, for recovery. *Robins Dry Dock & Repair Co.* v. *Dahl, supra; Chelentis* v. *Luckenback S. S. Co., supra; Southern Pac. Co.* v. *Jensen,* 244, U. S. 205, 37 S. Ct. 524, 61 L. Ed. 1086, L. R. A. 1918C 451, Ann. Cas. 1917E, 900.' 274 N. Y. at Pages 129, 130, 8 N. E. 2d at page 304. That was—as this is—an action for wrongful death under the local State statute which affords an appropriate remedy but does not modify the substantive maritime law upon which the rights and obligations of the parties arise. We are not unmindful of the recent decision in *Puleo* v. *H. E. Moss & Co.*, 2 Cir., 1947, 159 F. 2d 842, where an action was brought for wrongful death arising under the New York statute. If there is anything in that case contrary to our decision in *Kuhn* v. *City of New York, supra,* we are nevertheless con-

strained to reaffirm the rule there stated, since the decision in that case was predicated upon our understanding of the applicable decisions of the Supreme Court of the United States."

The court below (in this action under the maritime jurisdiction for personal injuries to a workman who fell through a hatch) held (R. 147-148):

> "We held in *Puleo* v. *H. E. Moss, Inc.* [159 Fed. (2) 842] that the employee of a sub-contractor engaged in freeing a tanker's piping of gasoline was in the position of a 'business guest,' and that the shipowner's liability depended upon the law of New York, the ship being moored to a wharf in this port. In *Riley* v. *Agwilines, Inc.* [296 N. Y. 402] the Court of Appeals of New York pointed out that in so holding we had ignored several decisions of the Supreme Court [*Robins Dry Dock & Repair Co.* v. *Dahl*, 266 U. S. 449; *Messel* v. *Foundation Co.*, 274 U. S. 427, 434; *Spencer Kellogg & Sons, Inc.*, v. *Hicks*, 285 U. S. 502, 514] which, following *Southern Pacific Co.* v. *Jensen* [244 U. S. 205] had held that in cases closely parallel the law of the sea displaced the local law. Whether those decisions are still law depends upon what is left of the whole doctrine of *Southern Pacific Co.* v. *Jensen, supra*, which has proved to the last degree difficult in application, even in the field of workmen's compensation where it arose. The Supreme Court had for long obviously continued to recognize it at all only with mounting reluctance [*Just* v. *Chambers*, 312 U. S. 383, 392; *Parker* v. *Motor Boat Sales Co.*, 314 U. S. 244; *Davis* v. *Department of Law*, 317 U. S. 249]; and in *Standard Dredging Co.* v. *Murphy* [319 U. S. 306], Justice Black for a unanimous court declared that 'the *Jensen* Case has been severely limited, and has no vitality beyond that which may continue as to state workmen's compensation laws' (p. 309). * * *"

It is respectfully submitted that the Court below erred in assuming the question depended upon "what is left of the

whole doctrine of *Southern Pacific Co.* v. *Jensen*", 244 U. S. 205. Irrespective of the extent to which that case is still law, this Court plainly decided in *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85, that the rights of one "performing a function essential to maritime service on board a ship (*supra*, p. 97)"—as was true of this petitioner—were determined by the federal admiralty law. "In many other cases this Court has declared the necessary dominance of admiralty principles in actions in vindication of rights arising from admiralty law", *Garrett* v. *Moore-McCormack Co.*, 317 U. S. 239, 244. The case, therefore, presents the same anomalies in the law which existed under the doctrine of *Swift* v. *Tyson*, 16 Pet. 1, prior to this Court's decision in *Erie R. Co.* v. *Tompkins*, 304 U. S. 64—that is, an individual's rights, under the same factual situation and in the same state, vary as he (or his opponent) chooses a state or a federal court.

2. The decision of the court below is in conflict with the decision of the Fourth Circuit in *State of Maryland* v. *United States*, 165 F. 2d 911. The court below held that local law, the law of New York, rather than the law of the sea, applies to this proceeding. In *State of Maryland* v. *United States, supra*, the Fourth Circuit applied the law of the sea and not the local law in a situation closely parallel to the case at bar. In the Fourth Circuit case the State of Maryland was suing for the use of the surviving widow and surviving mother of an employee of the American Ship's Service Co., an independent contractor, which had contracted to clean the holds of respondent's vessel. In each case the vessel was tied to a dock in navigable waters within the concurrent jurisdiction of a state. In each case the vessel was under the control of the respondent. In the case at bar, the petitioner was injured while employed on board the vessel by an independent contractor to clean

its water tanks. In the Fourth Circuit case, libellant's decedent was killed while employed on board the vessel by an independent contractor to clean its holds. It is true that in the Fourth Circuit case the libellant's decedent was called a stevedore by the court and in the case at bar the petitioner is not so called by the circuit court of appeals but is by the district court (R. 130, 132), but in both cases the actual activities of the person injured and his relationship to the shipowner were substantially identical. The Second Circuit refused to apply the law of the sea and applied the local law, in that case, the law of New York. The Fourth Circuit applied the law of the sea.

3. The decision of the court below is inconsistent with the decision of this Court in *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85.

In the *Sieracki* case, this Court held that a vessel owner was liable for its failure to provide a seaworthy vessel and a safe place to work for an employee of an independent contractor, a stevedoring company, on the ground that the employee was performing "the ship's service with the owner's consent". 328 U. S. at p. 95. To the contrary, the court below has held that there is no liability towards the petitioner—the employee of an independent contractor engaged in cleaning the vessel's tanks and boilers—although it recognized that cleaning a ship's tanks and boilers may be regarded equally with loading a vessel as part of the "ship's service". The court below said:

> "* * * The grounds of the majority in *Seas Shipping Co.* v. *Sieracki, supra,* were that a stevedore performs part of the 'ship's service,' more particularly that: 'Historically the work of loading and unloading is the work of the ship's service, performed until recent times by members of the crew' (p. 96). The work of cleaning a ship's tanks and boilers may be equally regarded as part of the 'ship's service,' and presum-

ably such work in the past was done by the crews; and, for that matter, much of the upkeep of a ship has always been done by the crew, and still is, at least at sea. A modern ship for example carries, not only the traditional ship's 'carpenter,' but at times a substantial complement of repairmen, [fol. 148] who are members of the crew, and are protected by an implied duty that she shall be seaworthy. It is impossible to be sure how far the new doctrine may go, for everything done on board a ship contributes to her 'service,' if it helps to make and keep her ready for her work; and probably all but major structural repairs were, at least in early times and elsewhere than in the home port, often made by the crew. Yet we should hestitate to read the decision as intended to extend the protection of what amounts to a warranty of seaworthiness to all workmen upon a ship, however casual their presence there, and however much their relation to the employer is unlike the early paternalistic status of master and crew, many of whose features have vestigially persisted to the present time. At any rate it is proper, if such an innovation is to be made, that it should await the sanction of the Supreme Court in the exercise of its function of supplying the inadequacies of the past. * * * "

It should be noted that the court below suggests in the portion of the opinion quoted above that the situations to which the doctrine of the *Sieracki* case is applicable can be decided only by this Court.

4. The decision of the court below is inconsistent with the decision of this Court in *Socony-Vacuum Oil Co.* v. *Smith*, 305 U. S. 424.

The court below held that the fact of negligence and *a fortiori* the degree of negligence of the respondent had not been established. Yet, it found the degree of negligence of the petitioner to be three times as great as the unknown negligence of the respondent. (R. 149, 150.)

This Court held in the *Socony-Vacuum* case, *supra*, 432-433, that the verdict in a similar situation depended upon a jury's determination under appropriate instructions of the trial court of the relative degrees of petitioner's and respondent's negligence.

Conclusion

The writ ought to be granted.

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